[Case Title] In re:Dow Corning Corporation, Debtor
[Case Number] 95-20512
[Bankruptcy Judge] Arthur J. Spector
[Adversary Number]XXXXXXXXXX
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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

In re: DOW CORNING CORPORATION,

Debtor.
_____/

Case No. 95-20512
Chapter 11

199 B.R. 896, 29 B.C.D. 824,
rev'd 212 BR 258 (E.D. Mich. 1997),
rev'd __F.3d __ (6th Cir. 199_)

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OPINION ON AUTHORITY OF OFFICIAL COMMITTEE OF CREDITORS TO ENGAGE IN LOBBYING

INTRODUCTION

The Court previously signed an Order, dated September 21, 1995, authorizing the Official Committee of Tort Claimants ("TCC") to retain a number of different law firms, including Vernor, Liipfert, Bernhard, McPherson & Hand, Chartered ("V & L"), to represent it in this bankruptcy proceeding. To

prevent duplication of services, the Order specifically set forth how the various responsibilities are to be allocated among the retained counsel. Presently, the services provided by V & L consist of: (1) "primary responsibility for matters relating to the estimation and valuation of tort claims against the Debtor;" (2) "develop[ing] and implement[ing] a comprehensive, cost efficient and expeditious claims resolution process;" and (3) shared responsibility "for negotiating, formulating and drafting a plan of reorganization." Amended Application of [TCC] for Order Approving Retention of Counsel at 4-5.

On March 7, 1996, the TCC filed an application seeking to expand V & L's scope of retention. If approved, V & L would be permitted to lobby certain governmental agencies and legislative groups, at the bankruptcy estate's expense, in order to counter alleged current lobbying activities of Dow Corning Corporation ("Debtor"). For various reasons, a hearing on the matter did not take place until June 20, 1996.

According to the TCC, the Debtor is currently engaged in lobbying efforts which, if successful, would negatively affect the rights of tort claimants in this case. To begin with, the TCC "believes that [the Debtor] is orchestrating an effort to lift the FDA moratorium on silicone breast implants." Application of [TCC] For Order Supplementing Retention of [V & L] ("Application") at 2. In the TCC's view, "[t]he purpose of this strategy must be to decrease the value of the tort claims since [the Debtor] is no longer in the breast implant business and, therefore, does not need the FDA moratorium lifted." Id. The TCC also asserted that the Debtor, without inviting the TCC to participate, is discussing prospective implant studies with the FDA. Id. The concern is that the Debtor "will seek to implement a [study] protocol that advances its litigation goals" and that because of this the TCC needs equal access to the FDA. Id.

Even more galling to the TCC is the Debtor's alleged attempt to influence certain proposed legislation, enactment of which would have a detrimental effect on the claims of its constituency. The

legislation of greatest concern to the TCC would apparently insulate companies that supply component parts or raw materials for use in implantable medical devices from any liability for harm caused by the implants if the injured person has not filed against the supplier prior to the effective date of the legislation. Presumably, the Debtor would argue that such a law would protect it from liability to persons who, while not having commenced suit against the Debtor, are nonetheless claiming injury from a silicone product which the Debtor supplied to other manufacturers. This, of course, would include the hundreds of thousands of people who were stayed from filing suit against the Debtor by this bankruptcy case. The enactment of other proposed legislation would also apparently limit the potential liability of the Debtor in those cases where it manufactured the implant.

The Debtor admitted that it viewed the proposed legislation favorably but claimed "as a matter of policy, [to have] taken a hands off role with respect to specific legislation or specific language." Hearing Tr. at 19. However, for purposes of this decision, the Court assumes that the Debtor, which could potentially reap enormous benefits from the existence of such a law, has indeed made some sort of attempt to bring the legislation in question to fruition. Consequently, this opinion is premised on the assumption that, in addition to the administrative agency activities detailed above, the Debtor is in fact lobbying for legislation that will retroactively eliminate or restrict certain causes of action which some tort claimants might have against the Debtor.

The Court has jurisdiction over this matter as provided by 28 U.S.C. §§1334 and 157(a). This contested matter is also a core proceeding. 28 U.S.C. §157(b)(2)(A). Pursuant to F.R.Bankr.P. 7052, the Court's conclusions of law follow.

OBJECTIONS

The Debtor and the Official Committee of Unsecured Creditors ("US/CC") lodged essentially

the same objections to the Application. First, they asserted that the TCC's proposed lobbying activity is beyond the scope of 11 U.S.C. §1103(c), which defines the role that Congress intended for an estate-compensated creditor's committee. Second, they claimed that the lobbying proposed by the TCC would only benefit certain segments of its constituency, and therefore conflicts with the fiduciary duties the TCC owes to its constituency as a whole. Finally, they alleged that forcing the Debtor to pay for the TCC's lobbying would violate the Debtor's First Amendment rights.

The constitutional argument goes like this. Corporations, like individuals, are entitled to First Amendment protection. See e.g., Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986) (compelling utility to disseminate views of ratepayers' group with which utility disagreed would violate its First Amendment rights); cf. 11 U.S.C. §101(41) ("'person' includes . . . corporation . . . ."). Because the First Amendment protects freedom of expression and association (and conversely, the right not to express or associate), a person generally cannot be compelled to support the expression of another's views. See Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (service charges collected by union from non-union public employees as a condition of employment generally cannot be used in furtherance of political and ideological purposes with which the employee does not approve); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (same); see also Keller v. State Bar of California, 496 U.S. 1 (1990); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

Other cases which seem to support the argument that compelling the Debtor to pay for the TCC's proposed lobbying would violate the Debtor's First Amendment rights include Pacific Gas & Elec., supra p.4; Hudgens v. NLRB, 424 U.S. 507 (1976) (striking employees prohibited from picketing employer's retail store because of fact it was located in a privately-owned shopping center); and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (shopping center can prohibit anti-war activists from distributing literature on its property). These cases

suggest that, regardless of the content or nature of the speech, one cannot be required to assist in the expression of an opinion or viewpoint.

The TCC counter-argued that the bar against requiring a person to support, financially or otherwise, expression to which the person objects is not absolute. Relevant Supreme Court cases held that service charges can be used to fund activity which is germane to the organization's stated purposes. For instance, in Abood, supra p.4, the Court held that the service charges could be used to advance the union's duties as collective bargaining agent of the employees. In Keller, supra p.4, the Court held that the state bar association could not use membership dues to fund political and ideological activities unless those activities were undertaken for the purpose of regulating or improving the legal profession. When the fulfillment of an organization's stated duties require it to advance the interest of its members in legislative and other political arenas, then its members can be compelled to support such activity. Lehnert, 500 U.S. at 520. Therefore, the dividing line between the types of expression one can and cannot be compelled to support is not necessarily dependent on whether the expression is political in nature. These cases, though not directly on point, appear to lend credence to the TCC's argument that if the proposed lobbying is within the permissible scope of a creditors' committee's activities, engaging in such conduct at the expense of the Debtor would not violate the Debtor's First Amendment rights.

The issue presented is one of first impression, and a difficult one at that. For example, if it is unconstitutional to compel a debtor to pay for a creditors' committee's legislative and administrative lobbying because the debtor disagrees with the content of the committee's speech, then how can it be constitutional to compel a debtor to pay for expression with which it disapproves when the speech occurs within the bankruptcy court? Why should speech in the legislative and executive arenas be uncompensated while similar speech in the judicial arena is compensated? The Debtor's response to this question was that by filing a voluntary petition for

relief it bargained for the expenses which §330(a) imposed upon it. Query: What happens in an involuntary case? Does a debtor forced into bankruptcy have a constitutional right not to finance committees' professionals?

On the other hand, if the constitutional issue were resolved in favor of the TCC, the Court would still have to decide whether the scope of a creditors' committee's permissible activities encompasses lobbying.

These concerns bear out the wisdom of a basic rule of statutory construction. When interpreting a federal statute a court is obligated "to avoid an interpretation . . . that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." Gomez v. United States, 490 U.S. 858, 864 (1989). Fortunately, there exists a plausible construction of §1103(c) which obviates the need to address the very interesting constitutional issue.

DISCUSSION

Section 1103(c) defines the actions that may be engaged in by a creditors' committee during the course of a bankruptcy case:

> (c) A committee appointed under section 1102 of this title may--
>
> (1) consult with the trustee or debtor in possession concerning the administration of the case;
>
> (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
>
> (3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;
>
> (4) request the appointment of a trustee or examiner under section 1104 of this title; and
>
> (5) perform such other services as are in the interest of those represented.

11 U.S.C. §1103(c).

This section does not explicitly assign a creditors' committee the power to lobby. Not surprisingly, there are no cases which have addressed the issue. The only provision of this statute which arguably provides the TCC authority to engage in such activity, and the one upon which the TCC most strongly relied, is §1103(c)(5). Read literally, this subsection appears to give a creditors' committee a broad grant of authority to do virtually anything that is "in the interest of" its constituents.[1] But this, like all laws, must be read in harmony with

[1]The argument that 1103(c)(5) should be read literally would be subject to the well-settled rule of statutory construction that "[a] statute should be construed so that effect is given to all its provisions, so that no

other provisions of the same enactment as well as non-bankruptcy law. So clearly a committee cannot point to §1103(c)(5) to justify bribing an official in order to advance its constituents' position. Therefore, even though courts have acknowledged that §1103(c)(5) permits a committee to take an active role in many important matters within the bankruptcy case,[2] they have nonetheless placed limits on the scope of this subsection.

For example, although a committee's powers extend to prosecuting lawsuits for the benefit of the estate, exercise of that power is subject to these prerequisites: the committee can sue only upon demonstration that "(1) a colorable claim exists that the debtor has not pursued, (2) the committee made a demand upon the debtor to bring the action, and (3) the debtor unjustifiably refused to pursue the action following the demand." Kenneth N. Klee, K. John Shaffer "Creditors' Committees Under Chapter 11 of the Bankruptcy Code," 44 S.C. L. Rev. 995, 1044 (Summer, 1993).

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part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another . . . ." 2A Sutherland Stat. Const. §46.06 (4th ed. Supp. 1991); Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (Courts have expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."). If §1103(c)(5) were interpreted as permitting a creditors' committee to do anything that is "in the interest of" its constituency then §1103(c)(1) - (4) would become unnecessary and meaningless -- void, superfluous, inoperative, etc. Not surprisingly, the TCC did not advance such an argument. It merely reasonably arhued that within the limited scope of §1103(c)(5) is the right to lobby Congress and regulators. Therefore, that is the issue, not whether §1103(c)(5) has any limits at all.

[2]Official Unsecured Creditors' Committee v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305, 1315 (1st Cir. 1993) (not contested that creditors' committee had authority, per §1103(c)(5), to enter contract with secured creditor concerning further distribution of proceeds paid by estate to secured creditor); Creditors' Committee v. Parks Jaggers Aerospace Co. (In re Parks Jaggers Aerospace Co.), 129 B.R. 265, 267 (M.D. Fla. 1991) (creditors' committee can have standing to act after confirmation of a chapter 11 plan but before its consummation); In re Doctors' Hospital of Tampa, Ltd., 183 B.R. 312, 314, 27 B.C.D. 545 (Bankr. M.D. Fla. 1995) (same); In re Diversified Capital Corp., 89 B.R. 826, 830, 19 C.B.C.2d 610 (Bankr. C.D. Cal. 1988) (same); In re Parrot Packing Co., 42 B.R. 323, 9 C.B.C.2d 877 (N.D. Ind. 1983) (with debtor's consent, creditor committee given standing to bring a motion to compel rejection of debtor's union contract); In re Myers, 168 B.R. 856, 860-62 (Bankr. D. Md. 1994) (creditors' committee given standing to request "an extension of time for filing of complaints to determine nondischargeability").

And although it might be in the best interests of the estate to sell an asset, a committee cannot usurp the power of management (trustee or debtor-in-possession) to make that choice. In re Calvary Temple Evangelistic Ass'n., 47 B.R. 520, 12 B.C.D. 1143 (Bankr. D. Minn. 1984).

In two important mass tort bankruptcy cases, the courts determined that a committee's powers under §1103(c)(5) did not extend to taking specified actions which were concededly in the interest of the committee's constituents. The point of distinction in both cases was that the activities were either taken or to be taken outside of the case itself.

In In re Johns-Manville Corp., 52 B.R. 879, 13 B.C.D. 668, 13 C.B.C.2d 689 (Bankr. S.D. N.Y. 1985), aff'd 60 B.R. 842 (S.D. N.Y.), rev'd and remanded on other grounds, 801 F.2d 60 (2d Cir. 1986)this Johns-Manville, the court explained that "[w]hile §1103 contemplates a committee taking an active role in the proceedings, it does not grant a committee blanket authority to represent its constituency in matters outside and independent of the bankruptcy case." 52 B.R. at 884. Therefore, the court refused to approve the appointment of another law firm to specially represent the equity committee in state-court litigation to compel a shareholders' meeting.

In In re Eagle-Picher Indus., Inc., 167 B.R. 102 (Bankr. S.D. Ohio 1994), the court reached a similar conclusion on facts close to ours. In that case, counsel for the equity committee sought compensation for fees incurred in trying to prevent the New York Stock Exchange from delisting the debtor's stock. The court drew a "distinction . . . between services which benefit shareholders, and services which benefit shareholders for which the bankruptcy estate should pay." 167 B.R. at 103. Even though the court recognized that keeping the debtor's stock listed on the exchange would benefit the constituents of the equity committee, it determined that the activity was independent of the bankruptcy case, was beyond the mandate of §1103(c) and was therefore

not compensable. Id. at 103-04.

In re New York Trap Rock Corp., 138 B.R. 420 (Bankr. S.D. N.Y. 1992), this point was starkly demonstrated. That court followed Manville's statement that §1103(c) "does not grant a committee blanket authority to represent its constituency in matters *outside* and independent of the bankruptcy case." 138 B.R. at 422, and likewise prohibited an equity committee from prosecuting a case in state court seeking to compel the chapter 11 debtor to hold a shareholders' meeting. But the court allowed the committee to argue that the Bankruptcy Court should order the debtor to do so. The court went so far as stating that

> counsel for the Equity Committee is limited in their representation of the shareholders to the extent of participating in the adversary proceeding. In the event that the Equity Committee succeeds on the merits, and an annual meeting is directed, counsel for the Equity Committee may not be compensated for any services performed the adversary proceedingin connection with the shareholders' meeting.

Id. at 423 -24. It concluded that the bankruptcy court had "authority to direct the debtor's officers and directors to comply with the corporate by-laws" and that "[c]learly, an official Equity Committee has standing as a party in interest to apply to the the bankruptcy court for an order compelling the debtor's directors to comply with the annual meeting mandated by the debtor's own by-laws." Id. at 423.[3]

None of these cases enunciate a reason why activities outside and independent of a bankruptcy case fall outside the scope of §1103(c)(5). But there is a well-settled canon of statutory construction which supports this conclusion. Under the rule of *ejusdem generis*, "where general words follow the enumeration of

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[3]The court also noted that three other courts had simply assumed that an official equity committee could bring a state court suit to compel a shareholders' meeting. See In re Heck's, Inc., 112 B.R. 775 (Bankr. S.D. W.Va. 1990); In re Saxon Indus., Inc., 39 B.R. 49 (Bankr. S.D. N.Y. 1984); In re Lionel Corp., 30 B.R. 327 (Bankr. S.D. N.Y. 1983). In re New York Trap Rock Corp., 138 B.R. 420, 423 (Bankr. S.D. N.Y. 1992). Because the legitimacy of such activity was not presented for decision, such cases are not authority for the proposition that committees may litigate non-derivative actions in state court.

particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." Black's Law Dictionary p.517 (6th ed. 1990). See also Sutherland, cases . . . . .

Subsections (1) - (4) of §1103(c) have one thing in common: they all relate to activities taken as part of the process of a chapter 11 reorganization. Subsection (1) permits a committee to consult with other parties about administration of the chapter 11 case which spawned the committee. Subsection (2) permits a committee to investigate the debtor and its business and any other matter relevant to the case which spawned the committee or to the formulation of a plan in the case which spawned the committee. Subsection (3) permits a committee to participate in the formulation of a plan of reorganization of the debtor, which is an activity which is at the heart of the chapter 11 process. Subsection (4) permits a committee to seek to replace management with a trustee or to have an examiner appointed to assist it and others to do the investigation for which (c)(2) provides.

Each of these powers relates to actions which intimately involve the core of the reorganization process and without the existence of a chapter 11 case, these powers would be meaningless. For instance, a bunch of creditors could not consult with a trustee or debtor in possession concerning the administartion of the case if there were no chapter 11 case. If there were no reorganization case, creditors would not be empowered to investigate the debtor or its businss or any other matter relevant to the case or to formulation of a plan. If there were no chapter 11, creditors could not be participating in the formulation of a chapter 11 plan. Nor could they seek the appointment of a trustee or examiner under section 1104. On the other hand, lobbying Congress and federal regulators is an activity which can be and almost exclusively is accomplished outside of the peculiar reality of a bankruptcy case. A reasonable construction of §1103(c)(5) then is that a committee can perform such other services <u>within the bankruptcy case</u> as are in the interest of those represented. For example, §1103(c) does not in so many words authorize a committee to even make a motion to dismiss the case or to convert the case

to chapter 7. Nor does it say that a committee may oppose a cash collateral agreement, or for that matter, any motion under §362, §363, §364 or §365. These must be the kinds of "other services" that §1103(c)(5) contemplates.

More important, however, is that any lobbying by the TCC is not an activity taking place within the bankruptcy forum. Unquestionably, the proposed legislation and administrative activity against which the TCC desires to lobby could have a negative impact on its constituents. But the fact is, neither the proposed legislation nor the FDA activity is an issue before this Court or ever will be. Thus, any lobbying in which the TCC might engage could only take place outside of this bankruptcy case. The cases which are closest to the situation presented here and make this important distinction are

CONCLUSION

While the limits of §1103(c)(5) are not precisely defined, there is a clear line of separation between the ability of a creditors' committee to act within the bankruptcy case and the ability to act independent of and outside the case. And this line of separation is reasonable.

First, this interpretation is consistent with analogous case authority on §1103(c)(5). Second, it comports with accepted rules of statutory interpretation and avoiding potential conflicts between the Bankruptcy Code and the Constitution. And third, the interpretation reflects the fact that a creditors' committee is a creature of bankruptcy law; it is created solely for the purpose of facilitating the bankruptcy process and absent a debtor

filing for bankruptcy protection, the creditors' committee would never come into existence. Consequently, activities like lobbying Congress or other governmental agencies which are independent of the bankruptcy case are beyond the mandate of §1103(c)(5) and not compensable by the estate. Because lobbying is beyond the power of a creditors' committee, the remaining issues--whether such activity would either violate the Debtor's First Amendment rights or violate the TCC's fiduciary duties to some of its constituents--need not be addressed.

Finally, this decision does not mean that the TCC is left without the ability to protect the interests of its constituency. A creditors' committee has statutory authority to "investigate the acts . . . [and] conduct . . . of the debtor, the operation of the debtor's business and . . . any other matter relevant to the case . . . ." 11 U.S.C. §1103(c)(2). The TCC may therefore monitor the Debtor's lobbying activity. It may then report its findings and suggestions to constituents. Armed with this information, the TCC's members and/or constituents can approach Congress or administrative agencies, at their own expense, to present their side(s) of the story.

Nor does this opinion in any way detract from the First Amendment rights of any claimant to seek redress from the government of his or her grievances. Each claimant, individually or as a group, can certainly lobby with or without professional assistance, using his or her own resources. But such activity must be private and not a part of the bankruptcy process.

For these reasons, an order denying the motion shall be entered.

Dated: August 15, 1996.

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ARTHUR J. SPECTOR
U.S. Bankruptcy Judge

Situations where a court permitted a creditors' committee to act on its own behalf, that is, not derivatively, were primarily restricted to activity taking place within the bankruptcy forum (i.e. continuing to function after confirmation of a plan and requesting extension of the bar date).

The only apparent exception to this was SPM Mfg., supra, where the court reversed a lower court order compelling a secured creditor to pay over to the chapter 7 trustee money it had agreed to pay general unsecured creditors as part of a contract entered during the pendency of the debtor's chapter 11 reorganization. Although the lower court asserted various rationales for its ruling, it never claimed that entering a contract with another party in the case was outside the committee's statutory powers, and neither did the appellees on appeal. 984 F.2d at 1315. Therefore, the case is weak authority to begin with. Furthermore, the contract's mutual promises were all related to activities within the bankruptcy case itself and even the term in question involved nothing other than an agreement on further allocation of a disbursement made by the bankruptcy estate. Negotiated agreements between parties in interest that resolve issues pending before the bankruptcy court are, in essence, activities taking place within the bankruptcy forum. Since the law favors settlement, see, e.g., In re Dow Corning Corp., 192 B.R. 415, 421 (Bankr. E.D. Mich. 1996), it is appropriate for parties in interest to enter into agreements that foster the resolution of a case and are not otherwise improper, illegal or contrary to the Bankruptcy Code.